IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEMYHA MICKEL,	:	
Petitioner,	:	
v.	:	**CIVIL NO. 05-CV-5980**
	:	
HARRY E. WILSON, et al.,	:	
Respondents.	:	
	:	

SUPPLEMENTAL MEMORANDUM OPINION

Rufe, J. **November 28, 2006**

Previously before the Court was Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. Initially, the matter was referred to United States Magistrate Judge Linda K. Caracappa for a Report and Recommendation, which she filed June 30, 2006. Thereafter, the Court reviewed the Petition [Doc. #1], the District Attorney's Response [Doc. #13], Judge Caracappa's Report and Recommendation [Doc. #14], and Petitioner's Objections to the Report and Recommendation [Doc. #17], and conducted an independent and thorough review of the record. The Court's review of the record established that the Petition should be denied. The Court approved and adopted Judge Caracappa's Report and Recommendation by Order dated October 16, 2006 [Doc. #20]. In error, however, the Court did not specifically address Petitioner's objections to the Report and Recommendation. The Court takes this opportunity to address Petitioner's sole substantive objection by way of memorandum supplementing its earlier Order [Doc. #20].

I. PROCEDURAL HISTORY

This Petition for Writ of Habeas Corpus came to the Court following Petitioner's conviction by jury in the Court of Common Pleas of Philadelphia County. On April 28, 2000,

Petitioner was convicted of (1) murder in the third degree, (2) possessing an instrument of crime, and (3) carrying a firearm on a public street. These charges arose out of an incident in which Petitioner fatally shot the doorman at an after-hours club in Philadelphia to which Petitioner was trying to gain entry. On July 26, 2000, Petitioner was sentenced to twenty to forty years on the murder charge and a consecutive two-and-a-half to five years on the remaining charges.

After sentencing, Petitioner filed a direct appeal to the Superior Court of Pennsylvania. On August 13, 2001, the Superior Court affirmed the trial court's judgment of sentence.[1] Petitioner sought review by the Pennsylvania Supreme Court. On May 8, 2002, the Supreme Court denied Petitioner's request for allowance of appeal.[2]

On October 4, 2002, Petitioner filed a *pro se* petition under Pennsylvania's Post Conviction Relief Act[3] ("PCRA"), and PCRA counsel was appointed. After reviewing the record, PCRA counsel, Thomas L. McGill, Jr., filed a "no merit letter" pursuant to Commonwealth v. Finley.[4] The PCRA court reviewed the no merit letter and the remainder of the record, and determined that Petitioner's claims were, in fact, without merit. As a result, on January 15, 2004, the court dismissed the PCRA petition.

Petitioner appealed the PCRA court's dismissal to the Pennsylvania Superior Court. On August 11, 2004, the Superior Court affirmed the dismissal.[5] Petitioner subsequently requested

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[1] Commonwealth v. Mickel, 785 A.2d 1031 (Pa. Super. Ct. 2001).

[2] Commonwealth v. Mickel, 798 A.2d 1288 (Pa. 2002).

[3] 42 Pa.C.S.A. § 9541 *et seq.* (1998).

[4] 550 A.2d 213 (Pa. Super. Ct. 1988).

[5] Commonwealth v. Mickel, 860 A.2d 1132 (Pa. Super. Ct. 2004).

allocatur review by the Pennsylvania Supreme Court. The request was denied on August 10, 2005.[6]

On November 15, 2005, Petitioner filed his Petition for Writ of Habeas Corpus claiming violation of his rights under the Sixth and Fourteenth Amendments to the Constitution, including multiple claims of ineffective assistance of counsel. On June 30, 2006, Judge Caracappa issued her Report and Recommendation [Doc. #14] recommending that the Petition be denied. In her Report, Judge Caracappa determined that Petitioner's first claim—that the trial court erred by denying his motion for a mistrial in violation of his rights under the Sixth and Fourteenth Amendments—was procedurally defaulted. The Report further determined that the remainder of Petitioner's claims were without merit.

On July 24, 2006, Petitioner filed his Objections to the Report and Recommendation [Doc. #17]. While Petitioner technically posed objections to each of the Report's determinations, the only substantive objection made was to the determination that he had procedurally defaulted his first claim. The remainder of Petitioner's objections were simply restatements of the claims made in his Petition, not specific objections to the Report's determinations. As a result, the Court will address only Petitioner's substantive objection.

II. DISCUSSION

As Judge Caracappa's Report and Recommendation clearly and skillfully articulated, a prisoner must exhaust his remedies in state court before seeking habeas corpus relief in federal court.[7] This exhaustion requirement includes the requirement that the petitioner "fairly present" his federal claims in state court "in a manner that puts the court on notice that a federal claim is being

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[6] Commonwealth v. Mickel, 882 A.2d 477 (Pa. 2005).

[7] O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).

asserted."[8] While the petitioner need not cite "book and verse" of the Constitution or federal law, the mere presentation or argument of a somewhat similar state-law claim is not sufficient.[9]

A petitioner who has failed to fairly present his federal claims has failed to exhaust his state remedies. If, however, state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied because there is no longer an available state corrective process.[10] In such a case, the petitioner is nonetheless considered to have procedurally defaulted the claims and the federal court reviewing the habeas petition is prohibited from considering the merits of those claims unless the petitioner can establish either "cause and prejudice" or a "fundamental miscarriage of justice" to excuse the default.[11]

In this case, Petitioner objects to the Report and Recommendation on the grounds that he did fairly present his first claim to the state courts. His only argument, however, is that he used the term "fair trial" in his initial brief to the Pennsylvania Superior Court[12] and that use of such a term is inherently sufficient for him to have fairly presented his claim to the state courts.[13] He argues that "the Third Circuit acknowledges that the term 'fair trial' is sufficient for Petition to have fairly

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[8] McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). The McCandless court later affirms that petitioners "must have communicated to the state courts in some way that they were asserting a claim predicated on federal law." Id.

[9] Id.

[10] Id. at 260.

[11] Id.

[12] See Brief for the Appellant at 16, Commonwealth v. Mickel, 785 A.2d 1031 (Pa. Super. Ct. 2001) (No. 2411 EDA 2000) [Ex. B to Doc. #13].

[13] See Pet.'s Objections to the Report & Recommendation at 3–4 [Doc. #17].

represented his underlying claim to the state courts."[14] This assertion is apparently based on one sentence in McCandless in which the court noted, "Nowhere are the terms 'constitution,' 'due process,' or even 'fair trial' mentioned," in finding that, for a long list of reasons, the petitioner had failed to fairly present his claims.[15] This argument is flawed. The Third Circuit's observation in McCandless was simply one more reason the petitioner's claims were found to have been procedurally defaulted. In no way did the court indicate that had the petitioner included such words, his claims would not have been defaulted, or that inclusion of such words in state-court argument would be alone sufficient for a petitioner to have fairly presented his federal claims, as Petitioner contends. Including a term such as "fair trial" in state-court argument may be a factor demonstrating that a claim is fairly presented when it is accompanied by other supporting facts, but nothing in McCandless indicates that the mere inclusion of the term is sufficient on its own.

Consequently, Petitioner's use of the term "fair trial" in briefs making exclusively state-law arguments is not sufficient by itself to demonstrate that he fairly presented his federal claim at the state level. The claim presented in Petitioner's state-court brief was presented as a purely state-law claim.[16] Petitioner cited only Pennsylvania state cases and made arguments based wholly on state law.[17] Nowhere did he invoke the Constitution, federal law, or a single federal case.[18] Petitioner did nothing to put the state courts on notice that a federal claim was being asserted; nor

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[14] Id. at 4.

[15] McCandless, 172 F.3d at 262.

[16] See Brief for the Appellant at 10–17, Mickel, 785 A.2d 1031 (No. 2411 EDA 2000) [Ex. B to Doc. #13].

[17] See id.

[18] See id.

did he communicate in any way that he was asserting a claim predicated on federal law. Accordingly, the Pennsylvania state courts, including the Superior Court, justifiably treated the claim as one of state law and considered its merits based on state law.[19] As a result, his first claim is procedurally defaulted.

Additionally, Petitioner has not even attempted to make any argument that his default is excused by showing cause and prejudice or a miscarriage of justice. Without proof of either, this Court cannot consider the merits of his claim that the trial court erred by denying his motion for a mistrial.

The remainder of Petitioner's objections to the Report and Recommendation lack substance. They are simply restatements that the Report errs in its determinations without any substantive argument as to how or why. As a result, they do not warrant any further response beyond the well-reasoned and articulate determinations made by Judge Caracappa in her Report and Recommendation.

Accordingly, the Court affirms its earlier Order approving and adopting the Report and Recommendation and denying the Petition for Writ of Habeas Corpus.

Respectfully Submitted By the Court,

/s/ Cynthia M. Rufe
CYNTHIA M. RUFE, J.

[19] See, e.g., Commonwealth v. Mickel, No. 2411 EDA 2000, at 3–4 (Pa. Super. Ct. Aug. 13, 2001) (disposition reported at 785 A.2d 1031) [Ex. C to Doc. #13].